RATNA SERI ARIF & ORS v. THE MAYOR OF THE CITY OF KOTA KINABALU & ORS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: S-01(IM)-43-02-2016]
20 SEPTEMBER 2017

CIVIL PROCEDURE: *Judicial review – Application for – Proceedings – Preliminary objection – Whether Judicial Commissioner correct in allowing respondents to raise issue of unclean hands – Whether court constrained by doctrine of stare decisis – Whether issue of unclean hands had already been raised at hearing and decided upon – Whether res judicata applied*

CIVIL PROCEDURE: *Res judicata – Issues raised – Preliminary objection against application for judicial review – Whether Judicial Commissioner correct in allowing respondents to raise issue of unclean hands – Whether court constrained by doctrine of stare decisis – Whether issue of unclean hands had already been raised at hearing and decided upon*

The appellants, owners of properties adjacent to the land ('the subject land') which was being developed by the third respondent into a condominium, filed an application for judicial review to quash the decision of the first respondent giving development and building approvals for the third respondent's high rise residential project. The appellants claimed that the planning approvals were unlawful, null and void on the ground of procedural unfairness, were unreasonable and irrational and were contrary to the legitimate expectation of the appellants. At the judicial review hearing, the first and third respondents raised certain preliminary objections namely, that (i) the application for judicial review was filed out of time; and (ii) the appellants had come to court with unclean hands as the appellants had illegally encroached into an open space adjacent to the third respondent's high rise residential project by building structures such as garage, a retaining wall and a pondok. According to the third respondent, the open space belonged to the State and that to grant the appellants the reliefs sought would tantamount to sanctioning an illegal occupation of the State land. The High Court Judge upheld the preliminary objection on the limitation issue but did not address the issue of unclean hands. Dissatisfied, the appellants appealed to this court. At the hearing of the appeal on 12 November 2014, the third respondent raised the issue of unclean hands against the appellants. After hearing the parties, this court overturned the High Court decision and ordered that the appellants' application for judicial review be heard on the merits. When the case came up for hearing before the High Court, it was heard by a different judge, the Judicial Commissioner ('JC'). The first

respondent submitted to the JC that the issue of unclean hands was never argued before this court at the hearing on 12 November 2014 and that the appellants' grounds of appeal never touched on the subject. The JC upheld the first and third respondents' preliminary objection and ruled that the appellants came to court with unclean hands and accordingly dismissed the appellants' application for judicial review. Thus, the appellants' entire application for judicial review was thrown out by the High Court on a preliminary point. The appellants appealed against the said decision. The question for determination was whether the JC was correct in allowing the first and third respondents to raise the issue of unclean hands by way of a preliminary objection, or whether the issue was *res judicata.*

Held (allowing appellants' appeal)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The issue of unclean hands raised by the first and third respondents was *res judicata*. It was not open to the first and third respondents to argue in the present appeal that the issue of unclean hands was not before this court at the hearing of the appellants' appeal on 12 November 2014 and could therefore be raised again before the JC by way of a preliminary objection. This court was constrained by the doctrine of *stare decisis* to agree with the appellants that *res judicata* or issue estoppel would apply to the issue of unclean hands. The third respondent's written submissions which it filed for purposes of the appeal on 12 November 2014 provided enough proof that the issue was indeed raised at the hearing and had been decided upon by this court. (paras 24-26)

Bahasa Malaysia *Headnotes*

Perayu-perayu, pemilik tanah yang bersebelahan dengan satu bidang tanah ('tanah subjek') yang dibangunkan oleh responden ketiga untuk membina sebuah kondominium, memfailkan permohonan semakan kehakiman bagi membatalkan keputusan responden pertama memberikan kelulusan pembangunan dan pembinaan kepada responden ketiga membina projek kediaman bertingkat tinggi. Perayu-perayu mendakwa kelulusan perancangan adalah tidak mengikut undang-undang, terbatal dan tidak sah atas alasan ketidakadilan prosedur, tidak munasabah dan tidak rasional dan bertentangan dengan jangkaan sah perayu. Semasa pendengaran semakan kehakiman, responden pertama dan ketiga membangkitkan bantahan awalan, antaranya, (i) bahawa permohonan semakan kehakiman difailkan di luar tempoh masa; dan (ii) perayu-perayu datang ke mahkamah secara tidak jujur kerana telah dengan secara tidak sah mencerobohi ruang terbuka bersebelahan dengan projek kediaman bertingkat tinggi responden ketiga dan membina struktur-struktur seperti garaj, dinding penahan dan pondok. Menurut responden ketiga, ruang terbuka itu dimiliki Negeri dan membenarkan perayu-perayu relief yang dituntut akan menyamai menyetujui pendudukan haram tanah Negeri itu. Hakim Mahkamah Tinggi

mempertahankan bantahan awalan berkenaan isu had masa tetapi tidak menangani isu ketidakjujuran. Tidak berpuas hati, perayu-perayu merayu ke mahkamah ini. Semasa perbicaraan rayuan pada 12 November 2014, responden ketiga membangkitkan isu ketidakjujuran terhadap perayu-perayu. Selepas mendengar kedua-dua pihak, mahkamah membatalkan keputusan Mahkamah Tinggi dan memerintahkan permohonan semakan kehakiman perayu-perayu didengar atas merit. Apabila kes dibawa untuk perbicaraan di Mahkamah Tinggi, ia didengar oleh hakim yang lain, Pesuruhjaya Kehakiman ('PK'). Responden pertama menghujahkan kepada PK bahawa isu ketidakjujuran tidak pernah dipertikaikan di mahkamah ini semasa perbicaraan pada 12 November 2014 dan alasan rayuan perayu-perayu tidak pernah menyentuh subjek itu. PK mempertahankan bantahan awalan responden pertama dan ketiga dan memutuskan bahawa perayu-perayu telah ke mahkamah secara tidak jujur, dengan itu permohonan semakan kehakiman perayu-perayu ditolak. Oleh itu, keseluruhan permohonan semakan kehakiman perayu-perayu dibatalkan oleh Mahkamah Tinggi. Perayu-perayu merayu terhadap keputusan tersebut. Persoalan yang dibangkitkan untuk penentuan adalah sama ada PK betul dalam membenarkan responden pertama dan ketiga membangkitkan isu ketidakjujuran melalui bantahan awalan, atau sama ada isu tersebut *res judicata*.

Diputuskan (membenarkan rayuan perayu-perayu)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Isu ketidakjujuran yang dibangkitkan oleh responden pertama dan ketiga adalah *res judicata*. Tidak terbuka kepada responden pertama dan ketiga untuk mempertikaikan dalam rayuan semasa bahawa isu ketidakjujuran tidak dibangkitkan di mahkamah ini semasa perbicaraan rayuan perayu-perayu pada 12 November 2014 dan oleh itu, boleh dibangkitkan sekali lagi di hadapan PK melalui bantahan awalan. Mahkamah ini dikekang oleh doktrin *stare decisis* untuk bersetuju dengan perayu-perayu bahawa *res judicata* atau isu estopel diguna pakai pada isu ketidakjujuran. Hujahan bertulis responden ketiga yang difailkan untuk tujuan rayuan pada 12 November 2014 memberikan bukti yang memadai bahawa isu itu telah dibangkitkan semasa perbicaraan dan telah pun diputuskan oleh mahkamah ini.

Case(s) referred to:
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Henderson v. Henderson [1843] All ER Rep 378 ***(refd)***
Hong Leong Bank Bhd v. Sheikh Ahmad Marzuki Sheikh Yusof [2014] 9 CLJ 939 CA ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

For the appellants - Chung Jiun Dau; M/s Chung & Assocs
For the 1st respondent - Catherine Chau; M/s Catherine Chau & Assocs
For the 2nd respondent - Dayangku Fazidah Hatun Pg Bagul; State Legal Counsel, Sabah
For the 3rd respondent - Norbert Yapp & Eow Ee Pei; M/s Norbert Yapp & Assocs

[Editor's note: Appeal from High Court, Kota Kinabalu; Judicial Review No: BK1-13JR-2/2-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] For the salient facts, we shall rely on those that learned counsel for the appellants had set out in his written submissions, with the necessary modifications. They are as follows. The appellants are the owners of properties adjacent to the land held under TL017522593 situated at Signal Hill, Kota Kinabalu, Sabah ("the subject land"), which is being developed by the third respondent into a 15-storey condominium. The third respondent is the registered owner of the subject land.

[2] The appellants had earlier filed an application for judicial review in the High Court at Kota Kinabalu amongst others to quash the decision of the first respondent giving development and building approvals for the third respondent's high rise residential project. The grounds on which the application was made were that:

(a) the planning approvals were unlawful, null and void on the ground of procedural unfairness;

(b) the planning approvals were unlawful, null and void on the ground that they were unreasonable and irrational; and

(c) the planning approvals were unlawful, null and void on the ground that they are contrary to the legitimate expectation of the appellants.

[3] At the judicial review hearing, the first and third respondents raised the following preliminary objections:

(i) that the application for judicial review was filed out of time;

(ii) that the appellants had come to court with unclean hands.

[4] The unclean hands issue relates to the third respondent's allegation that the appellants had illegally encroached into an open space adjacent to its high rise residential project by building structures such as a garage, a retaining wall and a pondok, in breach of By-Law 22 of the Building By-Laws 1951.

[5] The open space does not, however, belong to the third respondent. It belongs to the State. It was urged upon the court by the first and third respondents that to grant the appellants the reliefs sought would be tantamount to sanctioning an illegal occupation of State land and endorsing the use of the open space for personal benefit.

[6] On 13 August 2013, the learned High Court Judge upheld preliminary objection (i), ie, the limitation issue and dismissed the appellants' entire application for judicial review on that ground alone. The learned judge did not address the issue of unclean hands as he took the view that the limitation issue goes to the jurisdiction of the court.

[7] Being dissatisfied with the decision, the appellants appealed to this court. At the hearing of the appeal on 12 November 2014, the third respondent raised the issue of unclean hands against the appellants, and this can be seen from the following paras. 23 and 31 of learned counsel's written submissions:

> 23. Further, it is respectfully submitted that the Appellants' application for judicial review should not be entertained by this Honourable Court as they have come to court with unclean hands.
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> 31. In view of the clear legal principles that the court will not assist a litigant who comes to court with unclean hands, it is respectfully submitted that this Honourable Court ought to dismiss the Appellants' appeal with costs.

[8] It is thus clear that in asking this court to dismiss the appellants' appeal, the third respondent had relied on the ground that the appellants had come to court with unclean hands. After hearing the parties, this court comprising Justices Zaharah Ibrahim (now FCJ), Alizatul Khair Osman Khairuddin and Mohd Zawawi Salleh overturned the learned judge's decision and ordered that the appellants' application for judicial review be heard on the merits.

[9] By allowing the appellants' appeal, it is implicit that this court rejected the third respondent's contention that the appellants had come to court with unclean hands. It would have dismissed the appellants' appeal if it were otherwise. There can be no argument that the unclean hands issue was an issue that this court was called upon to determine as it was specifically raised by the third respondent in its written submissions.

[10] Dissatisfied with the decision, the first and third respondents filed separate applications for leave to appeal to the Federal Court. In the third respondent's application for leave, one of the questions posed was:

> Does the principle of 'unclean hands' apply to judicial review proceedings?

[11] Pending hearing of the leave applications, the appellants requested the High Court to fix the case for hearing, which the court obliged. When the case came up for hearing before the High Court on 15 May 2015, it was heard by a different judge in the person of the learned Judicial Commissioner ("JC").

[12] At the hearing, learned counsel for the first respondent told the learned JC that the issue of unclean hands was never argued before this court at the hearing on 12 November 2014 and that the appellants' grounds of appeal never touched on the subject.

[13] The learned JC adjourned the matter for ruling on 15 June 2015. However, he did not deliver his ruling on the appointed date but instead directed the parties to submit on the issue of unclean hands before proceeding (if at all necessary) with the substantive hearing of the judicial review application as he agreed with counsel that this court did not deal with the issue of unclean hands at the hearing of the appellants' appeal on 12 November 2014.

[14] On 29 December 2015, the learned JC delivered his decision whereupon he upheld the first and third respondents' preliminary objection and ruled that the appellants had come to court with unclean hands. He accordingly dismissed the appellants' application for judicial review. Thus, for the second time in as many preliminary objections raised, the appellants' entire application for judicial review was thrown out by the High Court on a preliminary point. It was against this decision that the present appeal before us was concerned with.

[15] As it turned out, and well after the learned JC had delivered his decision on 29 December 2015, the Federal Court on 27 October 2016 dismissed the first and third respondents' application for leave to appeal against this court's decision on 12 November 2014. This necessarily means that the decision of this court on the issue of unclean hands remains intact.

[16] Having heard arguments by the parties, we unanimously allowed the appellants' appeal and set aside the learned JC's decision. These are our grounds for allowing the appeal.

[17] Given the turn of events that preceded the filing of the present appeal, we think it would be useful, for context, to reproduce the following grounds of appeal that the appellants relied on to impugn the decision of the learned JC, as follows:

(a) That the learned JC had erred in law and in fact in dismissing the judicial review application on the basis of unclean hands;

(b) That the learned JC had erred in failing to consider that the issue of unclean hands had previously been argued before this court on 12 November 2014 and was *res judicata*;

(c) That the learned JC had erred in failing to consider that the third respondent had even proposed a question on unclean hands for the determination of the Federal Court in its application for leave to appeal to the Federal Court;

(d) That the learned JC had erred in failing to hold that the respondents were barred by issue estoppel from raising the issue of unclean hands, and in failing to hold that it was an abuse of process to do so.

[18] The question for our determination was whether the learned JC was right in allowing the first and second respondents to raise the issue of unclean hands by way of a preliminary objection, or whether the issue was *res judicata*.

[19] There is no dearth of authority on the point. Suffice it if we refer to four of them. First, *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74 where Sharma J held at p. 76:

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott*, *Hook v. Administrator-General of Bengal and Others and In the matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another*. Parties cannot raise a second time in the same suit an issue that has already been determined **either expressly or by necessary implication**. (See *Louis Dreyfus v. Arunachala Ayya*).
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> (emphasis added)

[20] Second, *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479. Gopal Sri Ram JCA (as he then was) delivering the judgment of the court quoted with approval the following pronouncements by Wigram VC in *Henderson v. Henderson* [1843] All ER Rep 378 at pp. 381-382:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.*
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> (emphasis added)

[21] Third, *Hong Leong Bank Bhd v. Sheikh Ahmad Marzuki Sheikh Yusof* [2014] 9 CLJ 939; [2015] 2 MLJ 12. In that case, the respondent filed an application to rescind the receiving order and adjudication order on the ground that the loan had been fully settled. The application was dismissed by the Registrar and the respondent appealed to the judge but subsequently withdrew the appeal.

[22] Some months later, the respondent again filed an application to annul and rescind the receiving order and adjudication order, which was again dismissed by the Registrar. However, on appeal to the judge, the appeal was allowed. On further appeal to this court, it was held that the respondent was estopped, pursuant to the principle of *res judicata*, from re-litigating the issues of annulment and rescission of the adjudication order and receiving order and the expungement of the proof of debt admitted by the Director-General of Insolvency under the conventional loan. This is what the court said at p. 949 (CLJ); p. 21 (MLJ):

> the respondent had the opportunity to fully ventilate his case before the learned judge in chambers in the hearing of his appeal against the decision of the learned registrar in encl 12A but had instead chosen to withdraw his appeal. The same cause of action may not be relitigated between the same parties as it is *res judicata*. It is trite that the respondent cannot litigate by instalments;

[23] Last but not least, the decision of the then Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 where it was held as follows at p. 200:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that **such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, ie doctrine of estoppel *per rem judicatum***.
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> **We are of the opinion that the aforesaid contrary view is to be preferred**; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.
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> (emphasis added)

[24] This authority binds us and all courts below us. We were therefore constrained by the doctrine of *stare decisis* to agree with learned counsel for the appellants that *res judicata* or issue estoppel would apply to the issue of unclean hands raised by the first and third respondents.

[25] On the facts and having regard to the authorities, it was clear to us that the issue of unclean hands raised by the first and third respondents in the court below was *res judicata*. We do not think it was open to the first and third respondents to argue before us in the present appeal that the issue of unclean hands was not before this court at the hearing of the appellants' appeal on 12 November 2014 and could therefore be raised again before the learned JC by way of a preliminary objection.

[26] Paragraphs 23 and 31 of the third respondent's written submissions which it filed for purposes of the appeal on 12 November 2014 provide enough proof that the issue was indeed raised at the hearing and had been decided upon by this court. It was for this reason that we allowed the appellants' appeal with costs, subject to payment of the allocator fee.